No. 42508-4-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent

vs.

TAMMY LYNN TAYLOR,
Appellant

OPENING BRIEF OF APPELLANT

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I. INTRODUCTION

COMES NOW the Appellant TAMMY TAYLOR (henceforth Appellant), by and through her counsel Stephen G. Johnson, to respectfully submit this opening brief in her appeal of the trial court's decision denying her motion to withdraw her plea of guilty.

II. ASSIGNMENTS OF ERROR

A. The Trial Court erred in entering the order of August 5, 2012, denying the Appellant's motion to withdraw her plea of guilty.

Issues Pertaining To Assignments of Error

Is the Appellant's guilty plea involuntary when she was not informed of, and consequently did not consider whether, the same criminal conduct analysis of RCW 9.94A.589 would apply to her sentence? (Assignment of Error A)

Did the Trial Court fail to objectively analyze whether RCW 9.94A.589 would reduce Appellant's offender score from 12 to 4? (Assignment of Error A)

Does claiming and finding that two alleged victims deny the Appellant relief under RCW 9.94A.589 violate the right against double jeopardy? (Assignment of Error A)

III. STATEMENT OF THE CASE

On or about July 1, 2011, Appellant filed in the Pierce County Superior Court a motion to withdraw her felony guilty plea entered on January 10, 2011, and sentenced on January 21, 2011. This motion was made pursuant to CrR 4.2(f) and 7.8(b)(5). The basis of the motion was

that Appellant's plea was not free and voluntary due to a lack of information about sentencing alternatives.

A. The Incidents

During all relevant times, Appellant was employed as a bank teller with Wells Fargo Bank of Gig Harbor.

On March 31, 2010, and at her place of employment, Defendant took a bank withdrawal slip, and filled in the name and account information of Ms. Nicole Wilson, a depositor at Defendant's Wells Fargo branch. After signing Ms. Wilson's name to the same withdrawal slip, Defendant withdrew $10,000.00 from Ms. Wilson's account, and took the same. CP 6-7, 106-107.

On May 29, 2010, and at her place of employment, Defendant took a bank withdrawal slip, and filled in the name and account information of Ms. Nicole Wilson, a depositor at Defendant's Wells Fargo branch. After signing Ms. Wilson's name to the same withdrawal slip, Defendant withdrew $10,000.00 from Ms. Wilson's account, and took the same. CP 6-7, 106-107.

On July 1, 2010, and at her place of employment, Defendant took a bank withdrawal slip, and filled in the name and account information of Ms. Nicole Wilson, a depositor at Defendant's Wells Fargo branch. After signing Ms. Wilson's name to the same withdrawal slip, Defendant

withdrew $9,600.00 from Ms. Wilson's account, and took the same. CP 6-7, 106-107.

On July 31, 2010, and at her place of employment, Defendant took a bank withdrawal slip and filled in the name and account information of Ms. Nicole Wilson a depositor at Defendant's Wells Fargo branch. After signing Ms. Wilson's name to the same withdrawal slip, Defendant withdrew $8,000.00 from Ms. Wilson's account, and took the same. CP 6-7, 106-107.

On or about August 3, 2010, Ms. Nicole Wilson entered the Gig Harbor branch of Wells Fargo (the branch Defendant was employed), and met with the Service Manager Ms. Aleksandra Wall to report questionable activity on her account. Ms. Wall's internal investigation revealed that $37,600.00 was withdrawn without proper authorization from Ms. Wilson's account. CP 6-7, 106-107.

On or about August 4, 2010, Defendant met with Wells Fargo Service Manager Ms. Aleksandra Wall, and confessed to the forgery and embezzlement of money from Ms. Wilson's accounts. Later, Defendant approached Ms. Wilson and confessed the same. Defendant resigned from her position at Wells Fargo. CP 6-7, 106-107.

On or about August 5, 2010, Defendant went to the Gig Harbor Police Department and confessed the same to law enforcement.

Defendant was arrested and booked on suspicion of having committed four (4) counts of First Degree Theft and four (4) counts of Forgery. CP 6-7, 106-107.

B. The Criminal Charges

On August 10, 2010, the Appellant was charged by information as follows:

March 31, 2010, Criminal Activity

One (1) count of ID Theft 1°, occurring on or about March 31, 2010 (Count I);
One (1) count of Theft 1°, occurring on or about March 31, 2010 (Count V),
One (1) count of Forgery, occurring on or about March 31, 2010 (Count IX),

May 29, 2010, Criminal Activity

One (1) count of ID Theft 1°, occurring on or about May 29, 2010 (Count II),
One (1) count of Theft 1°, occurring on or about May 29, 2010 (Count VI);
One (1) count of Forgery, occurring on or about May 29, 2010 (Count X);

July 1, 2010, Criminal Activity

One (1) count of ID Theft 1°, occurring on or about July 1, 2010 (Count III),
One (1) count of Theft 1°, occurring on or about July 1, 2010 (Count VII);
One (1) count of Forgery, occurring on or about July 1, 2010 (Count XI);

July 31, 2010, Criminal Activity

One (1) count of ID Theft 1°, occurring on or about July 31, 2010 (Count IV);
One (1) count of Theft 1°, occurring on or about July 31, 2010 (Count VIII);
One (1) count of Forgery, occurring on or about July 31, 2010 (Count XII).

CP 1-5.

C. Plea and Sentencing

On or about January 10, 2011, Defendant entered a plea of guilty to an amended information that was the same as the Original Information

in all respects except that the sentencing aggravator on Count I was deleted, and the date of incident on Count XII was corrected. CP 8-13. Appellant had no prior criminal history. CP 14-23.

Defendant was informed that her calculated offender score would be eleven (11) points (twelve (12) points for twelve (12) convictions, less one), giving her a standard range sentence for ID Theft 1° of sixty-three (63) to eighty-four (84) months in the Department of Corrections. CP 14-23. On the Appellant's Statement of Defendant on Plea of Guilty, the following was the prosecutor's plea offer:

> 84 mos (all counts concurrent) Defense can argue low end (63 mo), $100 DNA, $500 CVPA, full restitution, $200 costs, no contact with victim, (theft 57 mos concurrent with other counts) 12 mo comm Custody on ID theft charges, *Rec is only valid if defendant appears at sent If she FTA's, St will no longer allow Def. to ask for low-end St will also file bail jump

CP 18. The Court found the plea to be "knowingly, intelligently and voluntarily made" and that the "Defendant understands the charges and the consequences of the plea. There is a factual basis for the plea. The defendant is guilty as charged." CP 23.

On or about January 21, 2010, Defendant appeared before the Pierce County Superior Court, CDPJ, and was sentenced to, *inter alia*,

sixty-three (63) months in the Department of Corrections[1], the low-end of the range. CP 24-38.

D. The Motion To Withdraw The Guilty Plea

On August 5, 2011, the Appellant appeared before the Pierce County Superior Court, the Honorable Frank Cuthbertson presiding. Appellant argued that she should be allowed to withdraw her plea of guilty because she was not fully informed of her potential scoring under the SRA pursuant to RCW 9.94A.589 ("same criminal conduct"). Specifically, Appellant stated that under RCW 9.94A.589, her points for sentencing should have been four (4), sentenced on three (3), rather than twelve (12), sentenced on eleven (11). The difference would be a sentencing range of thirteen (13) to seventeen (17) months in the Department of Corrections rather than the sixty-three (63) to eighty-four (84) months that were imposed. CP 42-96; RP 2-13, 20-22.

The Trial Court denied the Appellant's motion, finding that there was not a manifest injustice under CrR 7.8. RP 22.

> But in this case, the bottom line is that I don't believe there's manifest injustice The plea was voluntary The agreement didn't change. I believe counsel was effective. Mr. Winskill is, you know, a highly respected lawyer in this community, has been practicing forever, and I believe Mr. Johnson was even hesitant to suggest that the representation was ineffective.

[1] Defendant was sentenced to 63 months on counts I through IV, 43 months on counts V through VIII, and 22 months on counts IX through XII, all run concurrently to one another.

> I have also looked at the issue of same criminal conduct and whether or not this case would, in fact - - whether that argument would have been persuasive at sentencing if she went to trial and if she was convicted, I believe, is questionable, particularly given the victimization in this case which seems to extend both to Wells Fargo and to the person whose account money was removed from And so for all of those reasons, I am going to deny the motion to withdraw the plea at this time.

RP 24-25. This appeal was timely made. CP 134-136.

IV. ARGUMENT

The Trial Court erred in denying Appellant's motion to withdraw her plea of guilty. The Trial Court also erred in finding that Appellant's right to be sentenced under RCW 9.94A.589 was thwarted due to "two" victims rather than "one."

Appellant's motion to withdraw was filed within one (1) year of her plea and sentencing, in compliance with RCW 10.73.090. See, In Re Quinn, 154 Wn.App. 816, 831-833, 226 P.3d 208 (Div. I, 2010).

A. THE TRIAL COURT ERRED IN DENYING APPELLANT'S CONSTITUTIONALLY DEFECTIVE PLEA OF GUILTY.

The Appellant's guilty plea was Constitutionally defective. The plea is defective because Appellant was not informed of a direct consequence of her plea, and that failure of information makes her plea "involuntary."

Constitutional due process requires that the Defendant's guilty plea be "knowing, voluntary, and intelligent." State v. Mendoza, 157 Wn.2d

582, 587, 141 P.3d 390 (2006), *citing* In Re Isadore, 151 Wn.2d 294, 297, 88 P.3d 390 (2004). See also, CrR 4.2(f). CrR 4.2(f) provides that once a guilty plea is accepted, the court must allow withdrawal of the plea only "to correct a manifest injustice." CrR 4.2(f). See also, Mendoza, 157 Wn.2d at 587. Generally, "manifest injustice" is found where a defendant is denied effective counsel, where a defendant fails to ratify a plea, where a defendant makes an involuntary plea, or where the prosecution breaches the plea agreement. See, Mendoza, 157 Wn.2d at 587, *citing* State v. Wakefield, 130 Wn.2d 464, 472, 925 P.2d 183 (1996).

"[A] defendant may also challenge the voluntariness of a plea when the defendant was misinformed about the sentencing consequences resulting in a more onerous sentence than anticipated." Id. Specifically:

> ***a guilty plea may be deemed involuntary when based on misinformation regarding a direct consequence of the plea***, regardless of whether the actual sentencing range is lower or higher than anticipated Absent a showing that the defendant was correctly informed of all the direct consequences of his guilty plea, the defendant may move to withdraw the plea

Mendoza, 157 Wn.2d at 591 (emphasis added). "[A] sentencing consequence is [a direct consequence of a plea] when 'the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." Id., at 588. Length of sentence is a direct consequence of pleading guilty. Id., at 590. When determining whether a plea is constitutionally valid or not valid, the Court is not to engage in a

subjective inquiry into the defendant's risk calculation and the reasons underlying his or her decision to accept the plea bargain. Id. at 590-591.

The issue before the Trial Court was whether the Appellant was advised and informed that her overall sentencing range should have been thirteen (13) to seventeen (17) months pursuant to RCW 9.94A.589 ("same criminal conduct"). According to the pleadings before the Trial Court, the Appellant was not advised prior to her plea of guilty that application of RCW 9.94A.589 could result in a sentencing range of thirteen (13) to seventeen (17) months in the Department of Corrections rather than the sixty-three (63) to eighty-four (84) months that were imposed. CP 42-96. As such, Defendant was misinformed of a direct consequence of her plea, and withdrawal of her guilty plea is the proper remedy.

1. The Trial Court Ignored The Appellant's Claim Of Misinformation In Favor Of Ruling Appellant's Trial Attorney Was "Effective."

Among the reasons found for denying the Appellant's motion was a finding that her trial attorney was effective. RP 22-23. The Appellant never claimed that her trial attorney was "ineffective" in violation of the Sixth Amendment to the United States Constitution. CP 42-96. Rather, the Appellant stated that she was not given information about how RCW 9.94A.589 would condense twelve (12) charges into four (4) charges

under same criminal conduct analysis. Id. Her trail attorney concurred, stating that he had no independent recollection of discussing RCW 9.94A.589 with her prior to her plea. Id. RP 22-23.

Mendoza does not require a predicate finding of ineffective assistance of counsel before a determination of whether the Appellant was fully informed of a direct consequence of her plea. Rather, "ineffective assistance of counsel" is one of several and distinct alternatives that form the basis of manifest injustice. See, Mendoza, 157 Wn.2d at 587 (supra). Appellant's plea is considered involuntary when there is misinformation regarding a direct consequence of the plea—even if the resultant sentence would increase. Mendoza, 157 Wn.2d at 591. It was error of the Trial Court to deny the Appellant's motion on a finding of effective assistance of counsel, and ignore whether she was properly informed of the direct consequence of her plea.

2. A De Novo Review Of The Uncontroverted Facts Shows That The Trial Court Erred In Finding That RCW 9.94A.589 Would Not Apply To Her Case.

In denying the Appellant's motion, the Trial Court opined that the Appellant would not be the beneficiary of the rights under RCW 9.9A.589:

> I have also looked at the issue of same criminal conduct and whether or not this case would, in fact - - whether that argument would have been

> persuasive at sentencing if she went to trial and if she was convicted, I believe, is questionable, particularly given the victimization in this case which seems to extend both to Wells Fargo and to the person whose account money was removed from.

RP 24-25. Essentially, the Trial Court ruled that RCW 9.94A.589 would not apply to the Appellant because there were two (2) victims. This is error.

If the facts are uncontroverted, the standard of review of whether multiple crimes are "same criminal conduct" is de novo. See, State v. Thorngren, 147 Wn.App. 556, 562, 196 P.3d 742 (Div. III, 2008).

The issue at hand is the application of RCW 9.94A.589, or same criminal conduct analysis, to the Appellant's case[2]. RCW 9.94A.589(1)(a) provides:

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[2] This is not a case about double jeopardy and the merger of offenses "The State may bring (and a jury may consider) multiple charges arising from the same criminal conduct in a single proceeding [ ] Courts may not, however, enter multiple convictions for the same offense without offending double jeopardy. [] 'Where a defendant's act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense. '" State v Freeman, 153 Wn.2d 765, 770-771, 108 P 3d 753 (2005) (citations omitted). "Because the legislature has the power to define offenses, whether two offenses are separate offenses hinges on whether the legislature intended them to be separate." In Re Francis, _ Wn 2d _, 242 P 3d 866, 869 (2010) One test is the "merger doctrine," which provides that "when the degree of one offense is raised by conduct separately criminalized by the legislature, we presume the legislature intended to punish both offenses through a greater sentence for the greater crime." Francis, 242 P 3d at 870 However, the legislature may explicitly provide that a crime be punished separately from any related crime. See, RCW 9A 52 050 (burglary is to be punished separately regardless of the accompanying felony committed that elevates it to a burglary) In the instant case, ID Theft 1° and Theft 1° would ***not merge*** because the Legislature specifically stated that ID Theft 1° was to be punished separately from the underlying crime that elevated it to 1° status See, RCW 9 35 020(2) and (6) Assuming that the Legislature did not enact RCW 9 35 020(6), Double Jeopardy/Merger jurisprudence would require that the charges of ID Theft 1° merge with Theft 1°, resulting in an offender score of eight (8), not twelve (12) The charge of forgery would not merge with either ID Theft 1° or Theft 1°

> Except as provided in (b) and (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentencing range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, ***That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those other offenses shall be counted as one crime.*** Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. ***"Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.***

RCW 9.94A.589(1)(a) (emphasis added). When determining whether crimes encompass the "same criminal conduct," "trial courts should focus on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next. As it did in Edwards, part of this analysis will often include the related issues of whether one crime furthered the other and if the time and place of the two crimes remain the same." State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987), *citing* State v. Edwards, 45 Wn.App. 378, 382, 725 P.2d 442 (1986). This is an objective test. Id. at 216. The Dunaway "furtherance test" is to be used "to determine the intent of the accused in each successive offense and whether one offense was in furtherance of another." State v. Collicott, 118 Wn.2d 649, 668, 827 P.2d 263 (1992). The Collicott Court set out clear public policy for favoring this approach:

> We do so [adopting the Dunaway furtherance test] because we are now convinced that double punishment is avoided under the Dunaway approach and the merger doctrine. The lesser offense merges into the greater offense when one offense raises the degree of another Dunaway provides another protection ***if the defendant's criminal***

purpose did not change from one offense to another, then the offenses encompass the same criminal conduct and the sentences cannot be enhanced by an offender score

Collicott, 118 Wn.2d at 668-669 (emphasis added).

3. Objective Analysis Demonstrates That RCW 9.94A.589 Applies To Appellant's Offenses.

The Appellant had one (1) criminal purpose, and that was to steal the money of her victim. Her purpose did not change when she employed means that constitute three (3) separate offenses. Thus, the commission of three (3) separate and distinct criminal offenses should have been counted as one (1) criminal conduct. To arrive at this conclusion, the Trial Court needed to objectively analyze the facts.

Appellant engaged in theft on four (4) occasions—March 31, 2010, May 29, 2010, July 1, 2010, and July 31, 2010. To further her criminal objective of theft on each of these occasions, the Defendant had to use the same victim's account information (an act of Identification Theft) and forge the same victim's signature on a withdrawal slip (an act of Forgery) in order to further her goal of Theft from this same victim. Each of these acts occurred simultaneously in order to further Defendant's criminal goal, objective and intent. On each of the four occasions, the Defendant (then a Wells Fargo teller) used a Wells Fargo bank withdrawal slip and filled in the name of Ms. Nicole Wilson (a depositor) and her account number, thus

committing one act of Identification Theft. The Defendant then signed the withdrawal slip in Ms. Nicole Wilson's name, thus committing one act of Forgery. Then, with a filled in withdrawal slip (by means of ID Theft and Forgery) took from Ms. Wilson's account an amount of money, thus committing one act of Theft. Because the amount of money taken exceeded $5,000.00, the Theft is classified as being first degree, and elevating the ID Theft also to first degree. All three (3) crimes had to be committed simultaneously to successfully complete the criminal act committed by the Defendant. . The three crimes committed on March 31, 2010, should have been counted as one (1) crime committed as "same criminal conduct." The three crimes committed on May 29, 2010, should have been counted as one (1) crime committed as "same criminal conduct." The three crimes committed on July 1, 2010, should have been counted as one (1) crime committed as "same criminal conduct." The three crimes committed on July 31, 2010, should have been counted as one (1) crime committed as "same criminal conduct."

This analysis was borne out by the Court in State v. Bickle, 153 Wn.App. 222, 222 P.3d 113 (Div. II, 2009). In Bickle, the defendant was charged, *inter alia*, with manufacturing marijuana and possession of marijuana. Defendant claimed that the act of manufacturing marijuana

and possession of marijuana were same criminal conduct for sentencing purposes, and the Court of Appeals agreed:

> Bickle's act of possessing and manufacturing marijuana make up a recognizable scheme in which one crime furthered the other Bickle needed to possess marijuana in order to manufacture more of it, and by manufacturing more, he them possessed more. Manufacture and possession lie within the same continuum, sharing the same criminal objective. Additionally, Bickle's marijuana possession and manufacturing existed concurrently at the same time and place—2824 South Ainsworth in Tacoma Finally, the victim for both offenses was the public.

Bickle, 153 Wn.App. at 225-228, 232, 234.

4. The Trial Court Erred By Declaring That Two Victims Defeated Appellant's Claim Of Same Criminal Conduct.

The Trial Court, in denying Appellant's motion to withdraw her guilty plea, concludes that relief under RCW 9.94A.589 would not be available to her:

> A "same course of conduct" argument is discretionary by the sentencing court. This argument is also questionable in the present case given that there are two known victims [sic] The account holder (Ms. Wilson) and the bank that ultimately took the financial loss (Key Bank) [sic]

CP 150.

A trial court erred. First, there is nothing in the facts before the Trial Court that there was more than one (1) victim of the Appellant. Second, the State never alleged that there were two (2) victims of Appellant's actions. CP 1-5, 8-12. Third, Appellant did not forge the name or signature of Wells Fargo on the withdrawal slip. Fourth, the

Appellant did not use account information belonging to Wells Fargo—in fact, it is unclear what property interest Wells Fargo has in the victim's bank account and the amounts therein? Fifth, a blanket refusal to apply RCW 9.94A.589 violates clearly established policy against offender score stacking—" if the defendant's criminal purpose did not change from one offense to another, then the offenses encompass the same criminal conduct and the sentences cannot be enhanced by an offender score." Collicott, 118 Wn.2d at 668-669 (emphasis added). Appellant's sentence was stacked by stacking an offender score in direct contradiction of public policy. Finally, to prosecute the Appellant for the same crimes arising out of the same transactions for two separate victims would violate the right to be free from double jeopardy under Art. I, Section 9, of the Washington State Constitution, as well as the Fifth and Fourteenth Amendments to the United States Constitution. See, State v. Johnson, 48 Wn.App. 531, 533-536, 740 P.2d 337 (Div. I, 1987) (double jeopardy offended when defendants were convicted of robbery charges of a second clerk in the same convenient store).

The Trial Court erred, and its decision denying the Appellant relief must be reversed.

V. CONCLUSION

For the foregoing reasons, the Appellant TAMMY TAYLOR respectfully requests that the Court REVERSE the ruling of the Trial Court, and allow the Appellant to withdraw her guilty plea.

DATED THIS 28th day of February, 2012.

STEPHEN G. JOHNSON, WSBA # 24214
Attorney for Appellant Tammy Taylor

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day, I caused a true and correct copy of this document to be served on the following persons below and in the following manners indicated below:

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DATED THIS 28th day of February, 2012, in Tacoma, Pierce County, Washington State.

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Attorney for Appellant Tammy Taylor